(3)

Supreme Court, U.S.
FILED
MAY 13 2002
OFFICE OF THE CLERK

No. 01-1307

IN THE

Supreme Court of the United States

Dianne Foster; MARK ALBRECHT; RICHARD DiGIACOMO, and BARRY LEE PARKS,

Petitioners,

v.

LORRAINE GARCY, in her official capacity as Superintendent, Board of Education, Livermore Valley Joint School District; KIM LOGAN, Superintendent, Ukiah Unified School District; JOE COTO, Superintendent, East Side Union High School District; RUTH MCKENNA, in her official capacity, Superintendent, Board of Education, New Haven Unified School District.

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

---

PETITIONERS' REPLY BRIEF

---

*Milton L. Chappell
Mark J. Beutler
c/o National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEYS FOR PETITIONERS
**Counsel of Record*

May 2002

14 pg

TABLE OF CONTENTS

Page

I. Rule 65(d) provides no solution to the paradoxical legal order which the panel's decision imposes 1

II. The Superintendents mischaracterize the panel's decision to obscure the circuit conflict 2

III. The Superintendents' state action argument confuses the issue 6

IV. The Superintendents confuse nonparticipation in illegal activity with interference in internal union matters 7

V. Under *Hudson*, public entities that assist labor unions in the illegal collection of agency fees are jointly liable 8

TABLE OF AUTHORITIES

CASES **Page**

Cramer v. Matish,
1990 WL 169640 (6th Cir. 1990) 5

Foster v. Garcy, 268 F.3d 689 (9th Cir. 2001) 3

Gilpin v. American Fed'n of State, County, & Mun. Employees,
875 F.2d 1310 (7th Cir. 1989) 5

Hohe v. Casey,
956 F.2d 399 (3rd Cir. 1992) 4

Hudson v. Teachers Local No. 1,
743 F.2d 1187 (7th Cir. 1984),
aff'd, 475 U.S. 292 (1986) 5, 9

Knight v. Kenai Peninsula Borough Sch. Dist.,
131 F.3d 807 (9th Cir. 1997) 6

Sheffield v. California Teachers Ass'n,
Nos. 01-15590, 01-15705 (9th Cir. 2001) 3

Teachers Union Local No. 1 v. Hudson,
475 U.S. 292 (1986) ..... *passim*

Tierney v. City of Toledo,
824 F.2d 1497 (6th Cir. 1987) 3, 6

TABLE OF AUTHORITIES (continued)

Page

Travelhost, Inc. v. Blanchard,
68 F.3d 958 (5th Cir. 1995) 2

United States v. Wilhelm Reich Found.,
21 Fed. R. Serv. 341,
17 F.R.D. 96 (D. Me. 1954), *aff'd sub nom.*
Baker v. United States,
221 F.2d 957 (1st Cir. 1955) 2

Weaver v. University of Cincinnati,
970 F.2d 1523 (6th Cir. 1992) 5-7

CONSTITUTIONS, STATUTES, RULES

U.S. Const. amend. I 5, 8-10

Civil Rights Act of 1871,
42 U.S.C. § 1983 ..... 2, 7

Cal. Educ. Code § 45061 1

Fed. R. Civ. P. 65(d) ..... *passim*

I. Rule 65(d) provides no solution to the paradoxical legal order which the panel's decision imposes.

Federal Rule of Civil Procedure 65(d) provides no escape from the reality that the panel decision effectively places public employers who enforce illegal agency fee demands beyond the reach of the federal judiciary.[1] Contrary to the Superintendents' argument, Rule 65(d) does not authorize federal courts to enjoin persons from engaging in conduct from which they have no legal duty to refrain.

It is true that Rule 65 permits an injunction against a party to reach conduct of a nonparty, if the nonparty has notice of the injunction and acts in "active concert or participation" with the enjoined party in committing the enjoined conduct. But Rule 65(d) reaches nonparties only if the nonparty breaches a preexisting legal duty: "Rule 65(d) . . . do[es] not impose any

---

[1] Petitioners previously argued, Opposition Brief ("Opp."), p. 17, that because forced withholding eliminates the need for termination or any other form of government enforcement of the illegal agency fee demands, the panel's decision results in *de facto* immunity for public employers. The Superintendents dispute this contention, reasoning that because California Education Code § 45061 gives fee payers the option to pay agency fees directly to the union, rather than through payroll deduction, a union may need to request a public employer to take disciplinary action against a fee payer who elects to pay fees directly, but then fails to do so. But all relevant collective bargaining agreements contain a standard clause, permitted under California law, providing for automatic payroll withholding for those who resist illegal enforcement of the agency fee through revocation of their payroll withholding authorization. Thus, it remains the case that under the panel's decision the constitutional obligations set forth in *Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292 (1986) can never arise in practice.

liability which would not exist without [the Rule]." *United States v. Wilhelm Reich Found.*, 21 Fed. R. Serv. 341, 17 F.R.D. 96 (D. Me. 1954), *aff'd on opinion below sub nom. Baker v. United States*, 221 F.2d 957 (1st Cir. 1955). Thus an injunction against the union could operate against a school district under Rule 65(d) only if the school district's "active concert or participation" confers liability on it under 42 U.S.C. § 1983, a liability the Ninth Circuit erroneously denied.[2]

II. The Superintendents mischaracterize the panel's decision to obscure the circuit conflict.

The Superintendents argue that there is no circuit conflict because the contrary decisions from other circuits concern faulty plans, whereas this case concerns implementation details of an otherwise valid plan. Opp., pp. 12-15 n.4. This contention is false. The panel made no determination that the "plan" in this

---

[2] The Superintendents argue that an injunction obtained against a union can be enforced against a school district under Rule 65(d) "because the employer undoubtedly acts in 'concert or participation' with the union in deducting the agency fee." (Opp., p. 5, citation omitted). Elsewhere, the Superintendents argue that they should be immune from liability because "in fulfilling its duties with regard to the notice, the union acts separately and independently of the employer." (*Id.*, p. 10). If the latter contention is true, then the former contention must be false. A lack of joint participation and concerted action would preclude enforcement of an injunction against the employer under Rule 65(d). *E.g.*, *Travelhost, Inc. v. Blanchard*, 68 F.3d 958, 962 (5th Cir. 1995) (injunction cannot operate against a nonparty unless the nonparty acts in concert with the party enjoined). Conversely, because the school districts act in concert with the union in enforcing the illegal agency fee demand, both the union and the school district are liable under Section 1983.

case was either adequate or operating. Nothing in the record would support that finding. The panel's decision is not limited to illegal "implementation details." The panel held that public employers had no duty under *Hudson* arising from the "routine collection" of the agency fee. This decision cannot be reconciled with *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), or decisions from the other circuits.[3]

---

[3] A concise refutation of the Superintendents' present position as to the meaning of the panel's decision and whether it creates a circuit conflict is provided, in a different Ninth Circuit case, by none other than the Superintendents' counsel.

> *Foster* discussed the issue of a "plan" not in the context of imposing any such additional requirement, but rather discussing the meaning of a Sixth Circuit case, *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987). In that discussion, which arose in the course of the court's ***rejection*** of the fee payers' argument based upon *Tierney, Foster* confirmed that *Tierney* is ***not*** the law of this circuit.

Reply Brief for Superintendents on Cross-~~Appeal at 3~~, *Sheffield v. California Teachers Ass'n*, Nos. 01-15590, 01-15705 (9th Cir. 2001).

> The only test that *Foster* imposes for public employer liability is whether the employer has taken adverse action against a fee payer that is more serious than a non-consensual payroll deduction.

Id. at 7.

> The *Foster* Court confirmed that *Tierney* is not the law of this circuit. . . . At no point did the *Foster* Court impose any requirement relating to a "plan" with regard to public employer liability in agency fee cases.

Id. at 9.

The distinction the Superintendents advance to the validity of a plan versus implementation details is not recognized in any court decision. No legal theory based on this distinction was advanced by any party. Moreover, audited financial disclosure is required by *Hudson*. It is not an implementation detail.

Equally specious is the Superintendents' argument that the Third Circuit's decision in *Hohe v. Casey*, 956 F.2d 399 (3rd Cir. 1992), does not directly conflict with the panel's decision. The Third Circuit held that

> The public employer may be called upon *to defend* the deduction of the fees and may be *enjoined* from imposing the fair share fees on nonmembers when it is determined that the exclusive representative has not complied with the constitutional requirements [for their collection].

Id. at 411 (emphasis added).

The Superintendents maintain that what *Hohe* must have meant was that the injunction against the union would apply against the public employer pursuant to Rule 65(d) as a person acting in "active concert or participation" with the union. As previously stated, that argument makes no sense because Rule 65(d) cannot create liability where liability does not already exist apart from Rule 65(d). The Superintendents' argument is further undermined by the fact that *Hohe* also states that "[t]he public employer may be called upon to defend the deduction of the fees." The injunction against the employer contemplated by *Hohe* arises from the employer being a defendant in a law suit in which a *Hudson* violation is proved, not, as the Superintendents posit, as a consequence of being served with an injunction naming only the union and those who act in concert with it.

The Superintendents also contend that the Seventh Circuit's decision in *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1197 (7th Cir. 1984), does not conflict with the panel's decision. They argue that "the Seventh Circuit's statement that the public employer merely must 'make *reasonably* sure' that the agency fees will not be used to subsidize ideological activities that are not germane to collective bargaining only underscores that it is not obligated to ensure that the details of the union's plan or of the union's implementation of the plan are perfect." Opp., pp. 13-14 (citation and emphasis omitted). The argument is a *non sequitur*. The *Hudson* court said nothing to suggest that the constitutional obligations for the collection of agency fees are less exacting for the public employer than for the union. Such a proposition would be contrary to the *Hudson* court's reasoning, which was grounded in joint participation and state action theory, not in any difference in the legal duties owed to nonunion employees by the constitutional joint tortfeasors.[4]

Equally unsound is the Superintendents' argument that the Sixth Circuit's decisions in *Weaver v. University of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), and *Cramer v. Matish*, 1990 WL 169640 (6th Cir. 1990), present no conflict with the panel's decision simply because both cases concerned an indemnification clause in the collective bargaining agreement. That fact, though true, in no way vitiates the panel decision's conflict with the Sixth

---

[4] *Hudson*, 743 F.2d at 1191; *accord Gilpin v. American Fed'n of State, County, & Mun. Employees*, 875 F.2d 1310, 1312 (7th Cir. 1989) ("The first amendment has been held to require the public employer and the union to establish efficacious procedures, including notice and right to a hearing, for determining how much of the union's proposed agency fee is proper") (citation omitted).

Circuit's holding that "both parties to a fair share agreement must be held accountable for their responsibility to see that *Hudson*'s commands are followed." *Weaver*, 970 F.2d at 1538.

For reasons that are unclear, the Superintendents argue that before resolving the conflict among the circuits, this court should await subsequent interpretations of an earlier Ninth Circuit case, *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807 (9th Cir. 1997). That two decisions from the same court are in conflict with decisions of the other circuits is no reason to deny *certiorari*. Moreover, the premise of the Superintendents' argument is false. *Knight* does not hold that employers have no legal duty to abstain from collecting agency fees where the constitutional preconditions have not been observed. All that *Knight* holds is that employers have no duty to inspect a *Hudson* notice *before* it is mailed to agency fee payers. 131 F.3d at 817. This only makes sense. Until the government acts to enforce the illegal agency fee requirement (by deducting fees or otherwise), there is no state action and no employer liability. That no court has rejected *Knight*'s reasoning proves nothing.[5]

III. The Superintendents' state action argument confuses the issue.

The Petitioners previously argued that because the unions are non-governmental actors, there is no intellectually tenable way to

---

[5] The panel's decision was not *based* on *Knight*, as the Superintendents suggest. Opp., p. 15. *Knight* cites with approval the specific passage from *Tierney* which holds that government enforcement of the agency fee through involuntary withholding triggers the constitutional duty. *Knight*, 131 F.3d at 817 (citing *Tierney*, 824 F.2d at 1504). Rather, the panel made an effort to ameliorate the tension between its holding and the decision in *Knight*.

hold the unions, but not the school districts, liable for a constitutional violation arising out of joint participation in the enforcement of an agency fee agreement. In rebuttal, the Superintendents confuse the issue and argue that private actors can be sued under Section 1983 without the presence of a public entity as a defendant. (Opp., pp. 4 n.1, 10, 14.) No one disputes that where private and public entities act in concert to violate the Constitution, a Section 1983 claim can be maintained solely against one without joining the other as a defendant. This fact does nothing to cure the illogic by which the panel concluded that although unlawful government action occurred, the government nonetheless did nothing unlawful.

IV. The Superintendents confuse nonparticipation in illegal activity with interference in internal union matters.

The Superintendents mischaracterize the issue in this case as "whether . . . public employers [have] a legal duty to police the union's compliance with *Hudson*'s 'adequate explanation' requirement when they deduct agency fees from the fee payers' paychecks." (Opp., p. 8.) All that the Constitution requires of public employers is to abstain from enforcing the illegal agency fee requirement unless and until it can be done lawfully. If the school districts' forbearance from enforcement of an illegal agency fee demand constitutes "policing the union" or "interference in internal union matters" under the Superintendents' definition of those terms, this activity is necessary only because the school districts agreed to serve as the unions' collection agents. As governmental entities, they have a duty to ensure that ***their own*** activities do not violate their nonunion employees' constitutional rights. *Weaver*, 970 F.2d at 1538.

Contrary to the Superintendents' contention, the unions do not "act alone and in their own interests." They act in concert by prior agreement with the employer.[6] That agreement reflects reciprocal concessions calculated to advance both parties' interests, in this case without regard to the nonunion employees' constitutional rights as they relate to terms and conditions of employment. It cannot be the rule that a public employer is not responsible for unconstitutional terms and conditions of its employees' employment.

V. Under *Hudson*, public entities that assist labor unions in the illegal collection of agency fees are jointly liable.

The Superintendents dismiss the *Hudson* Court's language imposing employer responsibility[7] by suggesting that this Court's mandate applies only in the context of the neutral fact-finding, and not the notice. (Opp., pp. 16-17.) Even as to the fact-finding, the Superintendents maintain that the constitutional obligations imposed by *Hudson* apply only to those employers who voluntarily undertake to administer the neutral fact-finding procedure (which they are not obligated to do). As addressed

---

[6] That a union can sue a school district to compel enforcement of a labor contract is a self-inflicted legal disability. Thus, it can provide no escape from the consequences of illegally taking the nonunion employees' money.

[7] *See* 475 U.S. at 307 n.20 ("the *government and union* have a responsibility to provide procedures that minimize th[e] impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights") (emphasis added).

more fully in the Petition (pp. 14-18), there is no language in *Hudson* that would support such a strained interpretation.

The Superintendents' argument that the teacher is better positioned to protect his or her rights against forced unionism than is the public employer is obviously wrong. Every federal court decision on point has reached the opposite conclusion.[8] It is unreasonable to force nonunion employees, each year, to incur the risks and costs of litigating a claim worth perhaps $50 on the hope that at the conclusion of the litigation they might recover their reasonable attorneys fees (which oftentimes exceeds $100,000). Moreover, even if the fee payer prevails, expert witness fees cannot be recovered.

The Superintendents pretend that they lack the competence and information to assess whether the union has complied with *Hudson*'s notice requirement. Therefore, they argue, fee payers should be expected to perform this task. But the fee payers have no greater competence and knowledge and, unlike the employer, have no bargaining power that would enable them to acquire necessary information, and no leverage by which to compel

---

[8] *See, e.g.*, *Hudson*, 743 F.2d at 1192 ("most violations of the First Amendment caused by union-security clauses or union-shop clauses . . . would go unremedied–maybe even undetected–if the employer had no duty to establish workable procedures for protecting dissenters' rights"). Additional authority is discussed in the Petition, pp. 22-25.

The Superintendents argue that the panel decision is supported by California law (Opp., pp. 7-8). It is axiomatic that unlawful "state action" is endorsed by the state, either by statute or otherwise. However, the United States Constitution prevails over contrary state law and policy.

compliance. The Superintendents also argue that it would constitute an improper intrusion into internal union matters for them to ensure that the *Hudson* notice is adequate before taking fees from their employees. Yet the Superintendents concede that *Hudson* imposes on employers exactly that requirement (their feigned ignorance and incompetence notwithstanding), if the issue is discipline or discharge. In any event, a notice to nonmembers required by First Amendment due process is not an "internal union matter."

Contrary to the Superintendents' contention, very few feepayers can incur the economic risk of litigating individually small claims. Unions, therefore, incur little risk by refusing to discontinue illegal collections. The better solution is for the public officials to abstain from making the illegal collection. It is not unreasonable to expect public school officials to abstain from involvement in illegal activity.

Respectfully submitted,

Milton L. Chappell*
Mark J. Beutler
ATTORNEYS FOR
PETITIONERS
*Counsel of Record**

May 2002